

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARVIN AND ELAINE ROSENTHAL</b>	:	DETERMINATION
	:	DTA NO. 816445
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the Administrative Code of the City of New York for	:	
the Year 1993.	:	

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Petitioners, Marvin and Elaine Rosenthal, 27 Old Mill Road, Ridgefield, Connecticut 06877-1316, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1993.

On February 8, 1999 and February 12, 1999, respectively, the parties waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 28, 1999, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Edmund J. Mendrala, Esq., and the Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel). After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

## ***ISSUES***

I. Whether the Division of Taxation properly determined that additional capital gains were attributable to New York sources in the year petitioners changed their residency to Connecticut.

II. Whether the Division of Taxation properly concluded that petitioners were not entitled to the resident credit under Tax Law § 620 for tax paid to Connecticut.

## ***FINDINGS OF FACT***

1. Petitioners, Marvin and Elaine Rosenthal, filed a timely Nonresident and Part-Year Resident Income Tax Return (Form IT-203), with a Change of City Resident Status form (Form IT-360.1) attached; and a New York City Nonresident Earnings Tax Return (Form NYC-203) for the year 1993. Part F of Form IT-203 asks part-year residents to check the box which describes their situation on the last day of the tax year. Petitioners checked “(2) moved out of New York State and received income from New York State sources during your nonresident period.” Petitioners entered July 23, 1993 as the date of their move. On their Form IT-203, petitioners reported the following as their Federal adjusted gross income:

	Federal Amount	New York State Amount
Wages, salaries, tips	\$300,234.00	\$300,234.00
Taxable interest income	1,138.00	664.00
Dividend income	794.00	463.00
Capital gains	136,162.00 <sup>1</sup>	79,428.00
State tax refund	12.00	0.00
Taxable amount of pensions	2,790.00	1,627.00

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<sup>1</sup> According to the Federal Schedule D attached to their Form IT-203, the \$136,162.00 represents petitioners' net long-term capital gains for 1993.

	Federal Amount	New York State Amount
Rents, royalties, partnerships, estates, trusts	(128,709.00)	(75,080.00)
Other income	4,055.00	2,365.00
Federal adjusted gross income	\$316,476.00	\$309,701.00

Petitioners subtracted a total of \$450.00, consisting of taxable refunds of New York State taxes (\$12.00) and in interest income on U.S. government bonds (\$438.00), from their Federal adjusted gross income and determined their New York adjusted gross income to be \$316,026.00. After claiming itemized deductions of \$17,998.00, they determined their New York State taxable income to be \$298,028.00 and the base New York State tax on that amount to be \$23,470.00. Petitioners then multiplied the New York State income percentage of 97.86%<sup>2</sup> by the base New York State tax of \$23,470.00 and determined the allocated New York State tax to be \$22,968.00. Petitioners claimed a New York State resident tax credit in the amount of \$6,025.00 for taxes paid to the State of Connecticut and determined their New York State tax to be \$16,943.00. Petitioners determined their part-year City of New York resident tax to be \$7,633.00 and their City of New York nonresident earnings tax to be \$572.00.<sup>3</sup> Petitioners determined their total State and City taxes to be \$25,148.00 and claimed a refund of \$9,422.00 of the reported total State and City taxes withheld.<sup>4</sup>

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<sup>2</sup> Petitioners determined the New York State income percentage by dividing the New York State amount of Federal adjusted gross income of \$309,701.00 by the Federal adjusted gross income of \$316,476.00.

<sup>3</sup> Petitioners determined the City of New York nonresident earnings tax due based on the gross wages earned by Marvin Rosenthal in the amount of \$127,133.00. A 1993 W-2 Wage and Tax Statement issued to Marvin Rosenthal by The Shorenstein Company East, 200 Park Avenue, New York, New York, in the amount of \$127,132.61 was attached to petitioners' Form IT-203.

<sup>4</sup> On June 16, 1994, a refund of \$9,422.00 was approved by the Office of the New York State Comptroller.

2. Attached to petitioners' IT-203 is a Federal Schedule D (Capital Gains and Losses) on which they reported \$136,162.00 in net long-term capital gains, \$128,709.00 of which was reported on Part II, Line 12. While amounts determined on any of the following forms are required to be reported on Line 12: gain from Form 4797; long-term gain from Forms 2119, 2439, and 6252; and long-term gain or (loss) from Forms 4684, 6781, and 8824, petitioners did not attach any of those forms to their Form IT-203. Neither the nature of the capital assets nor the respective dates of sale of the capital assets which were reported on Line 12 are part of the record.

3. A Connecticut Nonresident or Part-Year Resident Income Tax Return (Form CT-1040NR/PY) for the year 1993 was also attached to petitioners' IT-203. On the Form CT-1040NR/PY, taxpayers were required to check the box which described their resident status for the year 1993. Petitioners checked part-year resident. On this return, petitioners reported Connecticut adjusted gross income of \$313,686.00 and income from Connecticut sources of \$133,896.00, which consisted of wages and salaries of \$127,133.00; taxable interest income of \$474.00; dividend income of \$331.00; capital gains of \$56,734.00; taxable amount of pensions and annuities of \$1,163.00; a Federal Schedule E (rents, royalties, partnerships, estates, trusts, etc.) loss in the amount of \$53,629.00; and other income of \$1,690.00. Using the Connecticut adjusted gross income, petitioners determined the base Connecticut income tax to be \$14,116.00. They then multiplied the Connecticut income percentage of 42.86%<sup>5</sup> by the base Connecticut income tax and determined the allocated Connecticut income tax to be \$6,025.00. Although the Form CT-1040NR/PY allowed a part-year resident to compute and subtract a net credit for

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<sup>5</sup> Petitioners determined the Connecticut income percentage by dividing the income from Connecticut sources in the amount of \$133,896.00 by the Connecticut adjusted gross income of \$313,686.00.

income taxes paid to other jurisdictions from the allocated Connecticut income tax, petitioners failed to do so.

4. At some point, petitioners' 1993 New York State nonresident and part-year resident income tax return was assigned for audit.<sup>6</sup> When petitioners failed to respond to the Division of Taxation's ("Division") correspondence requesting information about the capital gains and losses reported on their 1993 income tax return, the Division sent a letter dated February 15, 1996 to them requesting, among other things, the following information: (1) the inclusive dates of their New York residence; (2) a copy of their Federal return with all supporting schedules and statements, including Schedule D, Form 1040 (Capital Gains and Losses) for 1993; (3) if property was sold, the exact location of that property; (4) if petitioners had capital gains, they were requested to provide the exact dates of the sales of assets; and (5) if petitioners had an installment sale and 1993 was not the first year of the sale, a copy of the Federal Form 6252 with Part 1 completed for the first year was requested. The letter informed petitioners that, if the dates of the sales of the capital assets were not provided, capital gains would be considered as earned during their period of New York residency. The letter further advised petitioners that, if they failed to respond within 30 days, the Division would compute the amount of tax and interest which they owed and send them a Statement of Proposed Audit Changes.

5. Petitioners did not respond to the Division's correspondence. On July 1, 1996, the Division issued a Statement of Proposed Audit Changes to petitioners asserting New York State and New York City personal income tax due in the total amount of \$6,738.12, plus interest, for a total amount due of \$7,988.11 for the year 1993. In the Statement of Proposed Audit Changes,

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<sup>6</sup> The record is silent as to when the audit commenced.

the auditor determined that the entire \$136,162.00 in capital gains was from New York sources, an increase of \$56,734.00 to the amount previously reported by petitioners. A corresponding increase of \$56,734.00 was made to the New York State amount of Federal adjusted gross income which, as a result of the increase, was determined to be \$366,435.00. The auditor did not make any adjustments to the Federal adjusted gross income reported by petitioners in the amount of \$316,476.00. Based on the adjustment to the New York State amount of Federal adjusted gross income, the auditor determined the New York State income percentage to be 115.79%, an increase of 17.93%.<sup>7</sup>

The Statement of Proposed Audit Changes contained a corrected tax computation as follows. The Federal adjusted gross income was determined to be \$316,476.00 and the New York adjusted gross income was determined to be \$316,026.00. New York itemized deductions of \$17,998.00 were allowed and the New York State taxable income was determined to be \$298,028.00, with the base New York State tax on that amount determined to be \$23,469.71. The auditor then multiplied the New York State income percentage of 115.79% by the base New York State tax of \$23,469.71, determining the allocated New York State tax to be \$27,175.58. Other New York State credits in the amount of \$6,025.00 were subtracted from the allocated New York State tax and the revised total New York State tax was determined to be \$21,150.58, less tax previously paid of \$16,942.46, for net New York State tax due in the amount of \$4,208.12. Based on a similar adjustment made in the capital gains for New York City purposes, petitioners' other City of New York taxes were revised to be \$10,163.00, less other City of New

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<sup>7</sup> The auditor determined the New York State income percentage by dividing the New York State amount of Federal adjusted gross income of \$366,435.00 by Federal adjusted gross income of \$316,476.00.

York taxes previously paid of \$7,633.00, for net other New York City taxes due in the amount of \$2,530.00.

The Statement of Proposed Audit Changes contained an explanation of the Division's position stating, in pertinent part, as follows:

Since you filed Form IT-203, New York Nonresident and Part-Year Resident Income Tax Return for 1993, and moved out of New York, the following rule applies. The total of all income you received while you were a resident and all income received from New York sources during your nonresident period must be entered in the New York column of your return. . . .

You made an error computing your reportable capital gains.

CITY TAX HAS ALSO BEEN RECOMPUTED.

The income percentage is computed by dividing the adjusted gross income in the New York State column on line 19 by the adjusted gross income in the federal amount column on line 19. (Capitalization in original.)

6. Subsequently, the Division issued a Notice of Deficiency (Notice No. L-012340217-5), dated August 26, 1996, asserting a total of \$6,738.12 in additional New York State and New York City personal income tax due, plus interest of \$1,348.63, for a total amount due of \$8,086.75 for the year 1993. The explanation and instructions section contained the following explanation: "The original notice sent to you on 07/01/96 showed the detailed computation of the additional amount due."

7. Petitioners timely requested a conciliation conference which was held on September 9, 1997. After the conciliation conference, the conferee issued a Conciliation Order (CMS No. 158350), dated January 2, 1998, which denied the request and sustained the Notice of Deficiency.

8. On April 1, 1998, a petition was filed seeking a redetermination of the deficiency asserted by the Division. In their petition, petitioners alleged that the Division erred in attributing certain income to New York State during their period of non-residency and by taxing

the gain on the sale of Colorado real estate. They also raised an additional issue relating to the allowability of a credit for taxes paid to the State of Connecticut. In their petition, they claim that in 1993 they changed “residence from New York State to Connecticut.” They also claim that they “sold certain real estate located in Colorado.” The petition does not set forth any further information concerning the alleged sale of the Colorado real estate.

Attachments to the petition include, among other things, an unsigned copy of petitioners' 1993 Form CT-1040NR/PY (Connecticut Nonresident or Part-Year Resident income tax return), as well as an unsigned copy of petitioners' 1993 Form IT-203. The copy of the Form IT-203 attached to the petition is missing Federal Schedules D and E. There is no documentary evidence pertaining to the alleged sale of the Colorado real estate attached to the petition.

9. The Division issued to petitioners a Notice of Claim,<sup>8</sup> dated May 22, 1998, asserting a deficiency greater than the amount asserted in the Notice of Deficiency. The notice, which is in the form of a letter, states that the greater deficiency is asserted under Tax Law § 689(d)(1). The Notice of Claim contains the following explanation:

Where a Petition for a Hearing is filed, the period of limitation is suspended until the decision of the Division of Tax Appeals is final. A greater Deficiency results from the disallowance of the Resident Credit claimed.

A resident tax credit is a credit allowed to a New York State resident. As a resident of New York State, you may claim a resident tax credit, for taxes paid to another taxing jurisdiction, on income earned outside New York State while you resided in New York State. As a Nonresident of New York, you may not claim a Resident Credit for New York State Income Tax purposes.  
(Article 22, Section 620 of the New York State Tax Law.)

Based on the above, we have disallowed the resident Credit of \$6,025.00, claimed on your 1993 New York personal income tax return, since you claimed the Credit

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<sup>8</sup> The Notice of Claim references petitioners' 1993 personal income tax return, assessment #L012340217.



for taxes paid to Connecticut for the New York wages earned during your nonresident period.

You may be allowed a Resident Tax Credit for taxes paid to New York State while you were a resident of Connecticut.

A Computation of the Greater Deficiency is outlined below.

Taxable Income previously assessed. ( L012340214) <sup>9</sup>		\$298,028.00
	<u>NYS</u>	<u>NYC</u>
Tax on above	\$ 23,469.00	\$ 10,163.00
Income Percentage:	115.79%	N/A
Allocated New York State Tax	\$ 27,176.00	N/A
Resident Credit	-0-	N/A
Revised Total Tax	\$ 27,176.00	\$ 10,163.00
Less: Taxes previously stated	-16,943.00	- 7,633.00
On original return		
Corrected Taxes Due	\$ 10,233.00	\$ 2,530.00
Tax due per deficiency dated 8/26/96	4,208.00	2,530.00
ADDITIONAL PERSONAL INCOME TAX		
SUBJECT TO THE NOTICE OF CLAIM	\$ 6,025.00	

This Notice of Claim of \$6,025.00 for 1993, is subject to interest from the due date of the return to the date of payment.

10. The Division, in its answer dated June 4, 1998, stated, among other things, that: (1) on their 1993 IT-203, Part-Year Resident Income Tax Return, as part of their Federal adjusted gross income, petitioners reported a total of \$136,162.00 in capital gains, but only attributed \$79,428.00 in capital gains to New York sources; (2) the audit found that the entire \$136,162.00 in capital gains was from New York sources, an increase of \$56,734.00, and, as a result, the New York amount of Federal adjusted gross income was increased to \$366,435.00 which was 115.79% of the Federal adjusted gross income of \$316,476.00; (3) pursuant to Tax Law former § 638(a), the Division found the additional capital gains were taxable to petitioners as part-year

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<sup>9</sup> There appears to be a typographic error in this reference to the assessment identification number of the Notice of Deficiency; the figure listed as the amount of taxable income previously assessed is correct.

residents because they failed to show that the gains: (a) were not earned during their New York resident period (Tax Law former § 638[a][1]); (b) did not accrue under the special accrual rules of Tax Law former § 638(c)(1) to petitioners' New York resident period; or (c) were not derived from New York sources during the period of non-residency (Tax Law former § 638[a][2]) (a similar adjustment was made to petitioners' New York City personal income tax). Additionally, the Division stated that: on their Form IT-203, petitioners improperly claimed the resident credit for taxes paid to Connecticut on income derived from New York while they were residents of Connecticut; and the Division, by Notice of Claim dated May 22, 1998, made a claim for an additional tax deficiency in the amount of \$6,025.00, plus interest thereon, for the resident tax credit which was improperly claimed pursuant to Tax Law § 689(d)(1). It also stated that the burden of proof is upon the petitioners to prove that the deficiency is erroneous and or improper; and the Division bears the burden of proof with respect to the additional deficiency asserted in the Notice of Claim.

11. Petitioners did not submit any additional documentary evidence.

### ***CONCLUSIONS OF LAW***

A. If upon examination of a taxpayer's return, the Division determines that there is a deficiency in income tax, it may mail a notice of deficiency to the taxpayer (Tax Law § 681[a]).<sup>10</sup> Although every notice of deficiency must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis in the absence of evidence challenging the basis or correctness of the assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv*

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<sup>10</sup> Title 11 of the Administrative Code of the City of New York contains essentially the same provisions as Article 22 of the Tax Law. All references to sections of Article 22 shall be deemed references, though uncited, to corresponding sections of Title 11.

*denied*, 81 NY2d 704, 595 NYS2d 398; *Matter of Kourakos v. Tully*, 92 AD2d 1051, 461 NYS2d 540, *appeal dismissed* 59 NY2d 967, 466 NYS2d 1030, *lv denied* 60 NY2d 699, 468 NYS2d 467, *cert denied* 464 US 1070, 79 L Ed 2d 215; *Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174).

The taxpayer bears the burden of proof when challenging a properly issued notice of deficiency (Tax Law § 689[e]). In the instant case, petitioners failed to submit any proof that the Division's Notice of Deficiency was incorrect. Petitioners filed a nonresident and part-year resident income tax return for the year 1993. On that return, petitioners attributed only a portion of their capital gains to New York sources. Petitioners failed to respond to any of the Division's written requests for information concerning the capital gains reported on their return. Because of petitioners' failure to supply information about the capital gains, the Division determined that all capital gains should be attributed to New York sources pursuant to Tax Law former § 638. Subsequently, a Statement of Proposed Audit Changes was issued based upon that determination. Petitioners failed to respond to the Statement of Proposed Audit Changes and the subject Notice of Deficiency was issued. In their petition, petitioners have asserted that the Division improperly attributed income to New York sources. Additionally, they have claimed that the Division, in the Notice of Deficiency, improperly attempted to tax the gain on the "sale of certain real estate located in Colorado." Other than their unsupported claim that such a sale took place, petitioners have failed to submit any evidence concerning the alleged sale of Colorado real estate. In fact, petitioners failed to submit any additional documentation although allowed to do so by the schedule for submission of documents and briefs established in this matter.

Petitioners have failed to submit any proof that the assessment was erroneous, and, therefore, the Notice of Deficiency is presumed valid and correct (*see, Matter of Leogrande v. Tax Appeals Tribunal, supra*).

B. Tax Law § 620(a) provides, in pertinent part, that:

A resident shall be allowed a credit against the tax otherwise due under this article for any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada, upon income both derived therefrom and subject to tax under this article. . . .

The term “income derived from sources within another state” is construed so as to be in accord with the definition of the term “derived from or connected with New York sources” as set forth in 20 NYCRR 132.2. Thus, the credit is allowable for income taxes imposed by another state upon compensation for personal services performed in such other state, income from a business, trade or profession carried on in such other state and income from real or tangible personal property situated in such other state (*see, 20 NYCRR 120.4[d]*).

C. By a Notice of Claim, the Division stated that it was asserting a greater deficiency than asserted in the Notice of Deficiency under the authority of Tax Law § 689(d). Tax Law § 689(d) authorizes the Commissioner to determine a greater deficiency than asserted in the notice and “determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at or before the hearing.” In such instance, however, the Division carries the burden of proof to establish the propriety of the increase (Tax Law § 689[e][3]).

The increased deficiency asserted in the Notice of Claim is based upon the Division's disallowance of the resident credit for taxes paid to the State of Connecticut which petitioners had claimed on their 1993 New York State nonresident and part-year resident income tax return. It is

clear from the record that the increased deficiency asserted by the Division in the Notice of Claim is proper. During the period in issue, petitioners changed their residence from New York City to Connecticut. Petitioner Marvin Rosenthal continued to be employed in New York City after petitioners' change of residence to Connecticut. In addition to a New York State return, petitioners filed a Connecticut part-year resident income tax return for the year 1993. On their Connecticut return, petitioners reported wages which Mr. Rosenthal received from his employment in New York City, while he was a resident of Connecticut, as part of the income which they received from Connecticut sources and determined their allocated Connecticut income tax to be \$6,025.00. It is that amount of tax which petitioners claimed as the resident credit on their New York State return. As noted in Conclusion of Law "B," New York State residents may claim a resident credit for taxes paid to another state on income earned in such other state while a resident of New York. Since the Connecticut income tax was imposed on wages earned by Mr. Rosenthal in New York City while petitioners were nonresidents of New York, they cannot claim the resident tax credit provided for in Tax Law § 620(a).

The Division has carried its burden of proof with respect to tax asserted in the Notice of Claim.

D. The petition of Marvin and Elaine Rosenthal is denied and the Notice of Deficiency, dated August 26, 1996, and the Notice of Claim, dated May 22, 1998, are sustained

DATED: Troy, New York  
December 23, 1999

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE